

United States Bankruptcy Court  
Eastern District of Michigan  
Southern Division

In re:

Kevin Robert Ashby,  
Debtor.

Case No. 05-41123  
Chapter 7

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Opinion Regarding Motion to Exclude Claims from Automatic Stay

I.

This matter is before the Court on Lisa Baylis Ashby's motion to exclude her claims from the automatic stay. Lisa Ashby is the former wife of the debtor, Kevin Robert Ashby. The parties were divorced on November 24, 2004. The divorce judgment ordered the debtor to transfer his interest in his Transamerica/Rossetti 401(k) to his ex-wife, less \$7100, through a Qualified Domestic Relations Order, to satisfy certain obligations of the divorce judgment. The Oakland County Circuit Court entered the QDRO on November 24, 2004.

Kevin Ashby filed a voluntary chapter 7 bankruptcy petition on January 14, 2005. On April 7, 2005, Lisa Ashby filed a motion for an order to exclude her claims from the automatic stay or for relief from the automatic stay. Specifically, Lisa Ashby seeks turnover of personal property awarded to her in the divorce judgment and a finding that the money in the 401(k) account that is subject to the QDRO belongs to her. Kevin Ashby filed an objection to the motion and the Court held a hearing on May 9, 2005, and took the matter under advisement.

II.

The automatic stay does not apply to property that is not property of the bankruptcy estate.

*Spartan Tube & Steel, Inc. v. Himmelspach (In re RCS Engineered Prods. Co., Inc.)*, 102 F.3d 223, 237 (6th Cir. 1996); *Boatman's Bank of Tenn. v. Embry (In re Embry)*, 10 F.3d 401, 404 (6th Cir. 1993). Personal property awarded to Lisa Ashby in the divorce judgment but in the possession of Kevin Ashby is not property of his bankruptcy estate. Accordingly, the automatic stay does not prevent Lisa Ashby from recovering her own personal property from Kevin Ashby.

On the other hand, the automatic stay does preclude Lisa Ashby from pursuing a claim for monetary damages for conversion of her personal property. A monetary damages claim would be a prepetition debt subject to the automatic stay. *See In re Dixon*, 295 B.R. 226 (Bankr. E.D. Mich. 2003) (regarding test to determine if claim is pre-petition debt). *See also Roberds, Inc. v. Lumbermen's Mut. Cas. Co. (In re Roberds, Inc.)*, 285 B.R. 651, 656 (Bankr. S.D. Ohio 2002) (same).

### III.

A QDRO is a domestic relations order that “creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.” 29 U.S.C. § 1056(d)(3)(B).

*In re Hthiy*, 283 B.R. 447, 451 (Bankr. E.D. Mich. 2002).

A QDRO creates a property interest in the plan for the spouse to whom it is awarded. *See McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192, 197 (6th Cir. 1996). *See also Lowenschuss v. Selnick (In re Lowenschuss)*, 170 F.3d 923, 930 (9th Cir. 1999); *Bush v. Taylor*, 912 F.2d 989, 993 (8th Cir. 1990). Accordingly, the money held in the Transamerica/Rossetti 401(k) subject to the QDRO is not property of Kevin Ashby’s bankruptcy estate and is not subject to the

automatic stay.

The Court will enter an appropriate order.

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Steven Rhodes  
Chief Bankruptcy Judge

Entered: June 12, 2005

cc: Joseph L. Hardig, III  
Mark H. Shapiro  
Darryl J. Chimko  
U.S. Trustee

Not for Publication